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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6891

VINCENZO BURRAFATO and
ANTONINA BURRAFATO,

Petitioners,

-against-

U.S. DEPARTMENT OF STATE and U.S.
IMMIGRATION & NATURALIZATION SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Relevant Statute 3

Relevant Regulation 4

Statement of the Case 5

Reasons for Granting the Writ 7

POINT I — The District Court Has Jurisdiction To Review A Decision Of The Department Of State To Deny A Visa Where The Denial Is Procedurally Defective And Based On An Error Of Law 7

POINT II — The Circuit Court's Finding That Only Aliens "Legally" In The United States Are Entitled To Procedural Due Process Is Contrary To Law 13

Conclusion 16

Appendix:

Opinion of the United States Court of Appeals for the Second Circuit A-1

Opinion of the United States District Court for the Eastern District of New York A-8

Letter from the Department of State, dated October 21, 1971, denying the visa A-17

TABLE OF AUTHORITIES

CASES CITED:

Boske v. Comingore, 177 U.S. 459 (1900) 9

Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967) 12

California Commission v. United States, 355 U.S. 534 (1958) 9

Estrada v. Ahrens, 296 F. 2d 690 (5th Cir. 1961) 14

Galvan v. Press, 347 U.S. 522 (1954) 13

Golobek v. Regional Manpower Administration, United States Department of Labor, 329 F. Supp. 892 (E.D. Pa. 1971) 14

Kleindienst v. Mandel, 408 U.S. 753 (1972) 2,7

Lem Moon Sing v. United States, 158 U.S. 538 (1895) 7

Noel v. Chapman, 508 F. 2d 1023 (2nd, Cir., 1975) 9

SEC v. Chenery Corp., 318 U.S. 80 (1943) 14,15

United States v. Toscanino, 500 F.2d 267 (2nd Cir. 1974) .. 13

STATUTES AND REGULATIONS:

8 U.S.C. §1182 3

22 CFR §42.130 4

MISCELLANEOUS AUTHORITIES

U.S. Code Cong & Admin. News 11

Gordon & Rosenfield, *Immigration Law & Procedure* 11

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 13, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at —— F. 2d —— (2nd, Cir., 1975) and is set forth in the Appendix hereto at pages A1 to A7. The opinion of the United States District Court for the Eastern District of New York is unreported and is set forth in the Appendix at pages A8 to A-16.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 13, 1975. The jurisdiction of this Court to review the judgment below is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the United States District Court has jurisdiction over a claim by a United States citizen spouse that her Fifth Amendment rights were violated by the exclusion of her husband from the United States where such exclusion was procedurally defective and made in violation of law.

2. Whether the United States District Court is without jurisdiction of a suit by an alien to compel a federal agency to comply with its own regulations (which require that prior to denying an immigrant visa, the applicant must be informed of the reasons for the denial and provided with an opportunity for rebuttal) merely because the alien has been found to be "illegally" in the United States on the ground that he entered the country without being in possession of the very document which he claims was unlawfully denied to him by that agency.

3. Whether, in failing to specify which of the thirty-one possible grounds for exclusion contained in Section 212(a) of the Immigration & Nationality Act formed the basis of the Petitioner's exclusion from the United States, the Department of State violated its own regulations which require that reasons for the denial of a visa and an opportunity for rebuttal be provided to the alien.

4. Whether the constitutional right of United States citizens to hear the views of a foreign speaker [to protect which the Supreme Court found jurisdiction in *Kleindienst v. Mandel*, 408 U.S. 753 (1972)] is a greater right so as to confer jurisdiction than that of a United States citizen wife to have her husband's consortium and support, which rights were undisputedly denied to her in violation of law.

5. Whether the Court has jurisdiction, even if no constitutional right is deemed violated, to review a denial of a visa made in violation of law, where the alien is denied a right that Congress and the Department of State's own regulations confer upon him and results in depriving his United States citizen wife of her rights to consortium and support.

6. Whether the Court can refuse to consider the merits of the Petitioners' claim where the denial of an immigrant visa on the basis of "association with organized criminal society" does not as a matter of law constitute a ground of exclusion under the statute alleged, Section 212(a)(27) of the Immigration & Nationality Act, thus allowing an unlawful decision of the Department of State to remain unchallengeable.

RELEVANT STATUTE

Immigration & Nationality Act, 66 Stat. 163 (1952), as amended:

Section 212, 8 U.S.C., Section 1182—

> (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; . . .

RELEVANT REGULATION

Title 22, Code of Federal Regulations (C.F.R.)—

Section 42.130 Procedure in refusing visas.—

(a) *Refusal Procedure* . . . When an immigrant visa is refused, an appropriate record shall be made in duplicate on a form prescribed by the Department which shall be signed and dated by the consular officer. The applicant shall be informed of the provision of law, or regulation issued thereunder, on which the refusal is based, and of any statutory provisions under which administrative relief is available. If the grounds of ineligibility may be overcome by the presentation of additional evidence and if the applicant indicates that he intends to submit such evidence, the original of Form FS-510 and the documents attached thereto may in the discretion of the consular officer and with the consent of the applicant be retained in the consular files for a period not exceeding 120 days after which time the original Form FS-510 and supporting documents shall be forwarded to the applicant if the refusal has not in the meantime been overcome. . . .

(b) *Review of Refusals at Consular Offices.* If the grounds of ineligibility may be overcome by the presentation of additional evidence, and if the applicant has indicated that he intends to obtain such evidence, a review of the refusal may be deferred for a period not to exceed 120 days. If the principal consular officer, or his alternate, does not concur in the refusal, he shall (1) refer the case to the Department for an advisory opinion, or (2) assume responsibility for the case himself.

(c) *Review of refusals by the Department.* The Department may request a consular officer in an individual case or in specified classes of cases to submit a report if an immigrant visa has been refused. The

Department will review such reports and may furnish an advisory opinion to the consular officer for his assistance in giving further consideration to such cases. If upon the receipt of the Department's advisory opinion the consular officer contemplates taking action contrary to the advisory opinion, the case shall be resubmitted to the Department with an explanation of the proposed action. *Rulings of the Department concerning an interpretation of law, as distinguished from an application of the law to the facts, shall be binding upon consular officers.* (emphasis added)

STATEMENT OF THE CASE

The Petitioner, Vincenzo Burrafato (hereinafter, "Burrafato") is an alien, a native and citizen of Italy. In 1961, he was married in Italy to the co-Petitioner, Antonina Burrafato, a citizen of the United States. Petitioners are the parents of two children born in Italy , oth of whom are now lawful permanent residents of the United States. Based on the marriage, the Immigration & Naturalization Service (hereinafter, the "Service") approved the status of Burrafato as the spouse of a United States citizen, the first step of eligibility in the procedure for conferring permanent resident status based upon a marriage to a United States citizen.

On or about February 1970, Burrafato applied at the American Consulate in Palermo, Italy for an immigrant visa to enter this country. While this application was pending, Burrafato's wife and children returned to the United States in January 1971. Without stating any reasons or providing any justification for his action, the United States consul subsequently informed Mr. Burrafato that his visa application had been denied. On or about October 21, 1971, in response to prior counsel's request for reconsideration, the Visa Office of the Department of State informed the Petitioners by letter that upon review:

> "[N]o facts were disclosed which would warrant a reversal of the original finding of ineligibility under Section 212(a) of the Immigration and Nationality Act." (A17)

As a result of the unbearable separation from his wife and children, and because of the frustration engendered by not knowing *why* he was found ineligible for admission to the United States, Burrafato left Italy and illegally entered the United States in an instinctive attempt to be reunited with his family. However, on or about December 7, 1972, the Service commenced deportation proceedings against him.

At the deportation hearing, Burrafato through his counsel, conceded he was deportable for having entered the United States without a valid visa, but he was awarded the privilege of voluntary departure by the Immigration Judge upon the required showing of his good moral character.

On June 4, 1974, the Petitioners commenced this action seeking declaratory and injunctive relief. However, on January 20, 1975, Judge Bruchhausen granted the Government's motion to dismiss the complaint for lack of jurisdiction* (A8, A16). Thereafter, on January 28, 1975, Judge Bruckhausen granted the Petitioners' motion to enjoin the Service, pending appeal, from deporting Burrafato or from withdrawing the privilege of voluntary departure until seven days following the issuance of the mandate by the Court of Appeals for the Second Circuit or any other extensions that may lawfully be granted.

On August 13, 1975, the Second Circuit rendered its opinion and affirmed the decision of the District Court (A1 to A7). Thereafter, the Second Circuit on September 25, 1975 and September 30, 1975 denied a petition for rehearing and a stay of

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*In the Government's affidavit filed in support of the motion, the Assistant United States Attorney stated that the basis of the denial was "association with organized criminal society". This was the first time that any basis whatsoever was made known to the Petitioners.

the mandate and on October 9, 1975, Mr. Justice Marshall denied a similar request. However, the Service has granted Burrafato an administrative stay until January 16, 1976.

REASONS FOR GRANTING THE WRIT

POINT I

THE DISTRICT COURT HAS JURISDICTION TO REVIEW A DECISION OF THE DEPARTMENT OF STATE TO DENY A VISA WHERE THE DENIAL IS PROCEDURALLY DEFECTIVE AND BASED ON AN ERROR OF LAW.

This case involves an attack on the decision of the Department of State in denying an immigrant visa to the spouse of a United States citizen where such a denial is made in total contravention of the Department of State's own regulations. It is important to keep in mind that the Petitioners are not seeking review of consular action, rather we are seeking revision of a *ruling of law* by the Department of State to deny a visa which ruling is controlling on the consul under 22 CFR §42.130(c).

The single ground upon which the complaint was dismissed was because the District Court determined that it lacked jurisdiction over the subject matter (A8 to A16). In affirming that decision the United States Court of Appeals for the Second Circuit conceded that the Petitioners have raised a substantial issue by their claim of denial of due process (A4). However, the Second Circuit determined that it lacked jurisdiction to consider the merits on the ground that the judiciary should not interfere with the policy of Congress in excluding aliens. In support of this conclusion, the Court relied upon the often-quoted language of *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895), cited with approval in *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), to the effect that the judiciary would not interfere with the legislative and executive policies regarding the exclusion of

aliens. However, this long-standing proposition has been held to apply where an attack is made on the *constitutionality, validity* or *efficacy* of a statute or policy. *No such attack is made herein.* To the contrary, the Petitioners rely upon an enactment of the executive branch embodied in 22 CFR Sec. 42.130 to support their claim that Burrafato had been denied procedural due process of law.

In *Kleindienst v. Mandel, supra,* the alien, Ernest Mandel, was denied a visa by the consul on the ground that he was ineligible for admission to the United States under Section 212(a)(28) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1182(a)(28).* The discretionary waiver of this ground of exclusion for non-immigrants as provided under Section 212(d)(3)(A) of the Act, 8 U.S.C. §1182(d)(3)(A), was also denied and as a result, Mandel and six United States citizens brought suit to review the denial of his visa. The plaintiffs alleged that the denial of the visa violated their First Amendment rights to hear and speak with Mandel. The Supreme Court, in reaching the merits of that claim, reviewed the decision of the Attorney General and the Department of State, to see whether the denial of the waiver, and hence the denial of the visa, was supported by "a facially legitimate and bona fide reason" (408 U.S. at p. 770). Thus, reliance by the District Court upon *Mandel* to support its finding of lack of jurisdiction is totally misplaced, since this Court held that it had jurisdiction to examine the merits of the visa denial.

The Second Circuit, in an attempt to distinguish *Mandel* held that no constitutional right of an American citizen was "implicated" herein. In so holding, the Court rejected the argument of the co-Petitioner, Antonina Burrafato, that her Fifth Amendment rights of due process and equal protection of the law were denied to her. She claims that by denying a visa to her

*That section makes aliens who advocate, *inter alia,* anarchism or the violent overthrow of the United States Government ineligible from admission to this country.

husband without providing him procedural due process, her rights to consortium as well as to the comfort and support of her husband represents to her an unlawful deprivation of "life, liberty or property, without due process of law", and a denial of equal protection of the law under the Fifth Amendment.

In rejecting the claim by Mrs. Burrafato, the Court of Appeals found it sufficient to merely refer to its recent decision in *Noel v. Chapman*, 508 F.2d 1023, 1027-28 (2d Cir. 1975). However, in *Noel* that Court specifically *found jurisdiction* to review the merits and merely refused to overturn the decision of the Immigration Service which had acted in *accordance* with its stated policy. In the present case, no such policy of the Service or the Department of State is under attack. Furthermore, in the present case, the Circuit Court *found no jurisdiction* to consider the merits and, of even greater significance, the actions of the Department of State complained of herein, are undisputedly *contrary* to its own regulations and therefore in *violation* of law (22 CFR Sec. 42.130).

The regulations promulgated by the Department of State in 22 C.F.R. §42.130 govern the procedures to be followed in denying a visa. Of course, it is undisputed that these regulations have the force and effect of law. *Boske v. Comingore*, 177 U.S. 459 (1900); *California Commission v. United States*, 355 U.S. 534, 524-543 (1958). Pursuant to 22 C.F.R. §42.130(a), an individual whose request for a visa has been denied, is entitled to be "informed of the provision of law, or regulation issued thereunder, on which the refusal is based". As previously stated, Burrafato was not informed of the particular basis for the denial until more than three years after his visa was denied.

Moreover, the clear intent of the regulations envisions disclosure of the adverse information in order that the applicant for the visa may present additional evidence to overcome the denial. If the applicant is not provided with the particular information which he must rebut, then the regulation allowing such an opportunity would be meaningless.

Furthermore, the original basis disclosed by the Department of State in denying Burrafato's application for a visa was set forth in the Department's letter of October 21, 1971 (A17). The letter claimed that the visa was denied under Section 212(a) of the Act, 8 U.S.C., §1182(a). However, that section contains the general classes of aliens ineligible to receive a visa and excludable from admission to the United States. That section is broken down into thirty-one subdivisions, including by way of illustrating the variety of causes, aliens who are mentally retarded, insane, sexual deviates, drug addicts, criminals, Communists, etc. It was not until some three years later that the Government in its affidavit in support of the motion to dismiss the complaint, chose to further refine the denial and limit the ground to Section 212(a)(27) of the Act, 8 U.S.C. § 1182(a)(27). Thus, by failing to disclose the particular subsection alleged, Burrafato was effectively precluded from knowing the basis of the visa denial in direct contravention of the regulation. Moreover, as of this date, no factual information to support this determination has ever been provided to Petitioners.

As previously indicated, although the original denial letter from the Department of State only referred to the general exclusion statute, Section 212(a) of the Act, 8 U.S.C. §1182(a), the Government in its affidavit in support of the motion to dismiss the complaint, characterized the ground for the denial as:

> ". . . pursuant to Section 212(a)(27) [association with organized criminal society] of the Immigration and Nationality Act . . . "

The Government's affidavit further stated that the basis of this belief was the files and records of the Immigration and Naturalization Service and the Department of State.

The Petitioners contend that it is a manifest and flagrant violation of law for the Department of State to rule that "association with organized criminal society" constitutes a ground of exclusion which Congress intended to include within the purview of Section 212(a)(27) of the Act, 8 U.S.C. §1182(a)(27).

The legislative history of this subsection is reflected in the *U.S. Code Cong. & Admin. News*, Vol. 2, p. 1703 (1952), as follows:

> "Paragraphs (27), (28) and (29) of Section 212(a) incorporate the provisions of Section 1 of the Act of October 16, 1918, as amended by Section 22 of the Subversive Activities Control Act of 1950, relating to the *exclusion of subversives.*" (emphasis added)

The Act of 1918 applied to aliens who advocated or were members or affiliates of organizations which advocated violent overthrow of the United States Government, 1 Gordon & Rosenfield, *Immigration Law and Procedure*, Sec. 2.47, p. 2-222.

The subversive Activities Control Act of 1950, 50 U.S.C., Section 781, et seq., pertains strictly to the control of Communists. In *Kleindienst v. Mandel, supra*, the Supreme Court made the following statement which further clarifies such purpose:

> "In the years that followed, after extensive investigation and numerous reports by Congressional Committee . . . , Congress passed the Internal Security Act of 1950, 64 Stat. 987. This Act dispensed with the requirement of the 1940 Act of a finding in each case, with respect to members of the Communist Party, that the party did in fact advocate violent overthrow of the Government. These provisions were carried forward into the Immigration & Nationality Act of 1952."

The Court went on to state:

> "We thus have almost continuous attention on the part of Congress since 1875 to the problems of immigration and of excludability of certain defined classes of aliens. The pattern generally has been one of increasing control with particular attention, for almost 70 years now, first to anarchists and then to those with Communist affiliation or views." (408 U.S. at 761).

What emerges from an analysis of the legislative history of Section 212(a)(27), is that Congress was concerned entirely with the exclusion of *political* subversives. There is not a single sentence contained anywhere in the legislative history tending to indicate that Congress, in drafting Section 212(a)(27) was seeking to exclude those engaging in ordinary criminal conduct, or those associating with people engaging in such conduct.

We submit that the proper approach to determine the scope of a provision contained in Section 212(a) was that taken by this Court in *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967). *Boutilier* involved a determination, within the context of a deportation proceeding, of whether or not the statutory words, "afflicted with a psychopathic personality" contained in Section 212(a)(4) of the Act, 8 U.S.C. §1182(a)(4), applied to an alien who was admittedly a homosexual. In determining that the alien's behavior *did* fall within Section 212(a)(4), this Court made an exhaustive analysis of the legislative history of that provision in order to determine the Congressional intent. The Court's conclusion was, therefore, based squarely on the various statutes, bills, and committee reports cited in the opinion. (387 U.S. at 120-123).

In the present case, a similar analysis of the legislative history of Section 212(a)(27) demonstrates that the conduct of which the alien has been accused, clearly does *not* come within the Congressionally intended ambit of the provision in question. For the reasons previously indicated, there is no question that Congress was concerned exclusively with threats to the national interest derived from political subversive activities. Accordingly, the State Department's ruling, including "association with organized criminal society" within the provisions of Section 212(a)(27) was contrary to the intent of that section, and an error of law.

Furthermore, the conclusion that "association with organized criminal society" was not included in Section 212(a)(27) is also

demonstrated by the fact that Congress has provided for exclusion of those involved with criminality in *other* subdivisions of Section 212(a). [Sections 212(a)(9), (10) and (23), 8 U.S.C. §1182(a)(9), (10) and (23).]

POINT II

THE CIRCUIT COURT'S FINDING THAT ONLY ALIENS "LEGALLY" IN THE UNITED STATES ARE ENTITLED TO PROCEDURAL DUE PROCESS IS CONTRARY TO LAW

In declining to find subject matter jurisdiction, the Circuit Court stated that:

> "If Vincenzo [Burrafato] were 'legally' within the United States, he might well have standing in the federal courts to require the Department of State to follow its own regulations. But he is not here legally." (A6)

However, as has long been held, an alien is entitled to the same constitutional protections of life, liberty and property under the due process clause as is afforded to citizens, and in defining this constitutional guarantee, the Supreme Court has held that "Fair Play" is the essence of due process. *Galvan v. Press*, 347 U.S. 522, 530 (1954). Furthermore, the Second Circuit has previously reacted severely against unlawful Government activity in order "to prevent district courts from themselves becoming accomplices in willful disobedience of law". *United States v. Toscanino*, 500 F.2d 267 (2nd Cir. 1974). There, the Court in reaffirming the doctrine that aliens in the United States may invoke the Fourth Amendment protection against illegal searches and the Fifth Amendment guarantee of due process stated, "No sound basis is offered in support of a different rule with respect to aliens who are the victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct. . . . " *United States v. Toscanino, supra*, at p. 280.

If the Second Circuit is sustained in its holding that an alien illegally in this country is denied access to the Courts to compel a governmental agency to abide by its regulations, it would render the regulations wholly meaningless and totally unenforceable. In essence then, although the executive branch has created a right, the aggrieved party would have no remedy.

The Petitioners strongly urge this Court that a finding of jurisdiction to review matters of law is essential to avoid granting unlimited immunity from judicial examination of arbitrary decisions made by a consular or State Department official in violation of law or regulations. A rejection of jurisdiction by the Courts leaves officials of the Department of State, unlike officials of any other agency, free to violate the law with impunity. As the Court in *Golobek v. Regional Manpower Aaministration, United States Department of Labor*, 329 F. Supp. 892 (E.D. Pa. 1971) stated in finding jurisdiction to review the denial of a labor certification:

> "The court's initial finding must be whether it has jurisdiction to review a determination relegated to the Secretary of Labor. . . . Previous cases have not squarely decided this problem. However, several have held that there is a general tendency to favor judicial review of administrative action which is especially powerful in immigration and naturalization cases. *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961), involved the excluding of an alien who was in possession of a visa. The court stated that the effect of the Administrative Procedure Act and the Immigration Act was to make available judicial review of agency action relating to immigration. It then found that a court of law was the proper place to test unauthorized administrative power. (329 F.Supp. at 894)"

The Court went on to state:

> "An administrative decision based upon erroneous legal standards cannot stand: *SEC v. Chenery Corp.*,

> 318 U.S. 80, 94, 63 S.Ct. 454, 87 L.Ed. 626 (1943). A denial of any review would leave petitioner helpless and subject to deportation despite the possible merits of the underlying case. (329 F. Supp. at 894)

Vincenzo Burrafato's plea to this Court is simple but desperate. He concedes, as he did before the Service, that he entered this country unlawfully and he is willing to leave voluntarily as provided by the Immigration Judge. Recognizing that he must leave as the law requires, he only asks that the Department of State also abide by the law. It should also be noted that this eleventh hour plea represents his last hope for ever returning to this country and bringing up his children as good, law-abiding citizens under his supervision. He does not seek additional time solely in the hope that he can obtain some immigration benefit, as none seems to be foreseeable. If the decision of the Circuit court is left undisturbed, a precedent wherein the State Department may violate the law with impunity, and abrogate the right of an American wife to the presence of her alien husband, will be perpetuated, and will adversely effect the lives not only of *these* petitioners, but of numerous other individuals who may not have the inclination or resources to bring the matter to the doorstep of this Court. We respectfully call upon this Court to rule that in late Twentieth Century, post Watergate America, *no* Federal Agency is above the law, or immune from judicial review.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 981—September Term, 1974.

(Argued May 6, 1975 Decided August 13, 1975.)

Docket No. 75-7081

VINCENZO BURRAFATO and ANTONINA BURRAFATO,

Appellants,

v.

UNITED STATES DEPARTMENT OF STATE and
UNITED STATES IMMIGRATION & NATURALIZATION SERVICE,

Appellees.

Before:

FEINBERG, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment entered in the Eastern District of New York, Walter Bruchhausen, *District Judge,* dismissing for lack of subject matter jurisdiction a complaint which sought declaratory and injunctive relief based on the claims that denial of a visa to an alien husband violated the constitutional rights of his citizen wife and that the failure of the Department of State to specify the reasons for denial of the visa denied the husband procedural due process.

Affirmed.

JOSEPH P. MARRO, New York, N.Y. (Martin L. Rothstein, and Fried, Fragomen & Del Ray, New York, N.Y., on the brief), *for Appellants.*

PETER A. GOLDMAN, Asst. U.S. Atty., Brooklyn, N.Y. (David G. Trager, U.S. Atty., and Paul B. Bergman, Asst. U.S. Atty, Brooklyn, N.Y., on the brief), *for Appellees.*

TIMBERS, *Circuit Judge:*

On this appeal from a judgment entered in the Eastern District of New York on January 22, 1975, Walter Bruchhausen, *District Judge,* granting defendants' motion pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the complaint which sought declaratory and injunctive relief, the essential issue is whether the district court correctly held that it lacked subject matter jurisdiction over the complaint which claimed that the constitutional rights of a citizen wife had been violated by denial of her alien husband's visa application without reason by the United States Counsel in Palermo, Italy, and that failure of the Department of State in accordance with its regulations to specify the reasons for denial of the husband's visa application denied him procedural due process.

We affirm.

I.

Vincenzo Burrafato is a native and citizen of Italy. In 1961 he was married in Italy to Antonina Burrafato, a United States citizen. They are the parents of two children, 11 and 9 years of age, both of whom were born in Italy. In February 1970, Vincenzo applied to the United States Consul in Palermo for a permanent immigration

visa to the United States. The application was denied on the ground that he was ineligible under Section 212(a) of the Immigration & Nationality Act (the Act), 8 U.S.C. §1182(a) (1970). Upon request of appellants' counsel by letter dated September 22, 1971, the Visa Office of the Department of State reviewed the denial of the visa application and informed counsel by letter dated October 21, 1971 that "no facts were disclosed which would warrant a reversal of the original finding of ineligibility under [the statute]."

In the meanwhile, without waiting in Italy to learn whether his visa application would be granted, Vincenzo entered the United States illegally on February 17, 1970. When the Immigration & Naturalization Service learned of his illegal entry, he was served on December 7, 1972 with an order to show cause why he should not be deported pursuant to Section 241(a)(1) of the Act, 8 U.S.C. § 1251 (a)(1) (1970). At his deportation hearing, Vincenzo admitted that he had entered the United States without a valid immigrant visa or other entry document for permanent residence. Accordingly, on July 25, 1974, he was found to be deportable under 8 U.S.C. §1251(a)(1) (1970) by an immigration judge, but was granted the privilege of voluntary departure until November 25, 1974 pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e) (1970).[1]

In the meanwhile, on June 4, 1974 the instant action was commenced in the district court seeking the relief stated above. In an opinion filed January 21, 1975, the court dismissed the complaint. After a notice of appeal was filed on

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1 Burrafato does not challenge the correctness of the finding that he was deportable under Section 241(a)(1) of the Act.

The privilege of voluntary departure permits an alien to avoid the stigma of deportation and may facilitate the possibility of his reentry into the United States. *Strantzalis* v. *Immigration & Naturalization Service*, 465 F.2d 1016 (3 Cir. 1972).

January 24, the court, on application of appellants, on January 28 stayed deportation of Vincenzo and further stayed withdrawal of the privilege of voluntary departure pending this appeal.

II.

Whether the district court was correct in dismissing the complaint for lack of subject matter jurisdiction turns of course on the validity of the claims alleged.

With respect to the claim that denial of Vincenzo's visa application violated the constitutional rights of Antonina, it is sufficient to note that this claim is foreclosed by our recent decision in *Noel* v. *Chapman*, 508 F.2d 1023, 1027-28 (2 Cir. 1975), where we reaffirmed the rule that no constitutional right of a citizen spouse is violated by deportation of his or her alien spouse. See also *Silverman* v. *Rogers*, 437 F.2d 102 (1 Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Swartz* v. *Rogers*, 254 F.2d 338 (D.C. Cir.), *cert. denied*, 357 U.S. 928 (1958).

III.

A closer question is presented by appellants' claim that the failure of the Department of State, in accordance with its regulations, to specify the reasons for denial of Vincenzo's visa application denied him procedural due process.[2]

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2 This is one of those cases where, in order better to focus on what this claim is about, it may be helpful to emphasize what is *not* claimed.

Appellants do not claim denial of due process in the deportation proceedings which would give the federal courts jurisdiction to insure that administrative tribunals conform to the traditional standards of fairness encompassed by due process in determining whether aliens who have entered the United States are deportable. *Bolanos* v. *Kiley*, 509 F.2d 1023, 1025-26 (2 Cir. 1975); *Galvan* v. *Press*, 347 U.S. 522, 530 (1954); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

Nor do appellants seek review of the denial of the visa application by the United States Consul in Palermo on grounds of lack of due

Appellants argue in essence that, in failing to specify under which of the thirty-one subsections of Section 212(a) of the Act Vincenzo was excluded, the Department of State did not comply with its own regulation, 22 C.F.R. §42.130 (1975), which requires it to inform an unsuccessful applicant for a visa of the reasons for denial of the visa and to allow the applicant an opportunity to refute the evidence of ineligibility that may have been used against him.[3]

This argument, as appellants' counsel acknowledges, must be considered in the light of repeated admonitions by the Supreme Court that the judicial branch should not intervene in the executive's carrying out the policy of Congress with respect to exclusion of aliens. As recently as its decision in *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972), the Court quoted with approval its earlier opinion in *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547 (1895):

> "The power of congress to exclude aliens altogther from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

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process. Indeed, counsel for Vincenzo specifically denied that any review of the consular determination was sought in the instant litigation. As we held long ago, "Whether the consul has acted reasonably or unreasonably, is not for us to determine. Unjustifiable refusal to visé a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. . . . It is beyond the jurisdiction of this court." *United States ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2 Cir. 1927), *cert. denied*, 276 U.S. 630 (1928).

3 The government's affidavit in support of its motion to dismiss the complaint in the district court stated that the reason for denial of a visa to Vincenzo was his "association with organized criminal society" in Italy. Section 212(a)(27) of the Act was cited as the applicable section under which he was excludable.

Despite this strong reaffirmation of judicial policy by the Supreme Court, appellants nevertheless urge that *Mandel* supports their claim that the district court has subject matter jurisdiction. We disagree. In *Mandel*, the Supreme Court was confronted with a challenge to the Attorney General's refusal to waive exclusion of an alien on the ground that First Amendment rights of those who wished to hear the alien would be infringed. The Court held only that, when waiver is not granted for a "facially legitimate and bona fide reason", the courts will not "test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 770.

Likewise, the courts of this Circuit have interpreted *Mandel* to require justification for an alien's exclusion. In *MacDonald* v. *Kleindienst*, 72 Civ. 1228 (S.D.N.Y., October 10, 1972) (*MacDonald I*), a three-judge court ordered the Secretary of State to set forth his reasons for refusing to waive the ineligibility of an alien. Then in *MacDonald* v. *Kleindienst*, 72 Civ. 1228 (S.D.N.Y., May 6, 1974) (*MacDonald II*), Judge Tenney accepted the reasons tendered as "facially legitimate and bona fide." *Id.* at 14, quoting from *Mandel*, *supra*, 408 U.S. at 770.

In each of these cases—*Mandel*, *MacDonald I and MacDonald II*—the claim was grounded on an alleged violation of First Amendment rights of American citizens over which the federal courts clearly had jurisdiction. The significant distinguishing feature of the instant case is that no constitutional rights of American citizens over which a federal court would have jurisdiction are "implicated" here.

If Vincenzo were "legally" within the United States, he might well have standing in the federal courts to require the Department of State to follow its own regulations. But he is not here legally. To give him rights due to his unlaw-

ful presence greater than those he would have had if he had not come to this country, would be the worst sort of bootstrapping and would encourage aliens to enter this country surreptitiously. See *Licea-Gomez* v. *Pilliod,* 193 F.Supp. 577, 582 (N.D. Ill. 1960).[4]

We hold, in short, that the district court correctly decided that it did not have subject matter jurisdiction to review what happened to Vincenzo in Italy or what he claims the Department of State did to him here.

Affirmed.

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4 We have carefully considered appellants' other claims and we find they do not provide any jurisdictional basis for their action.

DECISION AND ORDER OF THE HON. WALTER BRUCHHAUSEN, DATED 1/20/75 WITH ATTACHMENTS CONSISTING OF THE ADMINISTRATIVE ORDER TO SHOW CAUSE AND ORDER OF THE IMMIGRATION JUSTICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

VINCENZO BURRAFATO and ANTONINA BURRAFATO,

Plaintiffs,

-against-

U.S. DEPARTMENT OF STATE and
U.S. IMMIGRATION & NATURALIZATION SERVICE,

Defendants.

Appearances:
FRIED, FRAGOMEN & DEL REY, ESQS.
Attorneys for Plaintiffs
MARTIN E. ROTHSTEIN, ESQ.
LEONARD L. FINKEL
Of Counsel

DAVID G. TRAGER, ESQ.
United States Attorney
Eastern District of New York
Attorney for Defendants
PETER A. GOLDMAN, ESQ.
Assistant U.S. Attorney
Of Counsel

BRUCHHAUSEN, D.J.

The defendants, by Notice of Motion, dated October 3, 1974, returnable on October 30, 1974, moved for an order, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing the complaint upon the ground of lack of jurisdiction of the subject matter of this action.

The plaintiffs instituted this action for declaratory relief, to have the plaintiff, Vincenzo Burrafato, deemed a lawful citizen of the United States, injunctive relief and to review the decision of the United States Foreign Consulate's denial of an immigration visa to him. In paragraph 2 of the complaint, the plaintiffs allege, viz:

> "Vincenzo Burrafato duly applied for an immigration visa to come to the United States as the husband of a United States citizen. He was refused a visa by the Consulate General of the United States in Palermo, Italy, on a finding of ineligibility under Section 212(a) of the Immigration & Nationality Act (8 U.S.C., Sec. 1182(a)). Such finding was affirmed by the U.S. Department of State."

The records of the Immigration and Naturalization Service and the Department of State disclose that in or about February 1970 the visa was denied pursuant to Section 212(a)(27) of the said Act (association with organized criminal society).

8 U.S.C. 1182 provides, viz:

> "Excludable aliens — General classes (a) except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States. * * *
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."

On or about February 17, 1970, the plaintiff, Vincenzo Burrafato, entered this country at an unknown location as an illegal citizen, without having been inspected. Subsequent to his arrival, the Immigration and Naturalization Service caused an Order to Show Cause and Notice for a Deportation Hearing to be served upon him pursuant to 8 U.S.C. 1252, The Immigration and Nationality Act.

On or about December 7, 1972, the said plaintiff was served with an order by the Immigration and Naturalization Service to show cause why he should not be deported. He was represented by counsel at the hearing. Annexed and marked, Exhibit A, is a copy of the said order.

Also annexed hereto, and marked Exhibit B, is a copy of the decision of Immigration Judge Ira Fieldsteel, dated July 25, 1974, stating that "Upon the basis of respondent's admissions I have determined that he is deportable on the charge(s) in the Order to Show Cause."

In Noel v. Chapman, Circuit 2, dated January 3, 1975, the Court stated, viz:

> "Recently, in Kleindienst v. Mandel, 408 U.S. 753, 766 (1972), the Court reaffirmed the plenary power of Congress, quoting with approval the opinion of the first Mr. Justice Harlan in Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895):
>
> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

In Kleindienst, supra, pages 769, 770, the Court stated:

> "In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.
>
> "* * * We hold that when the Executive exercises this

power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment Interests of those who seek personal communication with the applicant."

Again in that case at pages 766, 767, the Court stated:

"Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens."

Upon due deliberation, it is ordered that the complaint be and it is hereby dismissed.

Copies hereof are being forwarded to the attorneys for the parties.

s/Walter Bruchhausen
Senior U.S.D.J.

ORDER TO SHOW CAUSE AND NOTICE OF HEARING

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act.

UNITED STATES OF AMERICA:
In the Matter of
Burrafato, Vincenzo

Respondent.

File No. A20 345 134

Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;

2. You are a native of Italy and a citizen of Italy.

3. You entered the United States at an unknown place on or about February 17, 1970.

4. It was then your intention to seek employment and remain indefinitely in the United States;

5. You were not in possession of a valid immigrant visa or other entry document for permanent residence.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law: Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who are immigrants not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document and not exempted from the possession thereof by said

Act or regulations made thereunder, under Sec. 212(a)(20) of the Act.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 20 W. Broadway, New York, N.Y., 14th floor on December 8, 1972 at 8:45 a.m., and show cause why you should not be deported from the United States on the charges set forth above.

Dated: December 7, 1972

IMMIGRATION AND NATURALIZATION SERVICE

s/Bar Lambert
ACTING DISTRICT DIRECTOR
NEW YORK DISTRICT

NOTICE TO RESPONDENT

Any statement you make may be used against you in deportation proceedings.

The copy of this order served upon you is evidence of your alien registration while you are under deportation proceedings, the law requires that it be carried with you at all times.

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

When you appear you may, if you wish, admit that the allegations contained in the Order to Show Cause are true and that you are deportable from the United States on the charges set forth therein. Such admission may constitute a waiver of any further hearing as to your deportability. If you do not admit that the allegations and charges are true, you will be given reasonable opportunity to present evidence on your own behalf, to examine the Government's evidence, and to cross-examine any witnesses presented by the Government.

You may apply at the hearing for voluntary departure in lieu of deportation. Moreover, if you appear to be eligible to acquire lawful permanent resident status the special inquiry office will explain this to you at the hearing and give you an opportunity to apply.

You will be asked during the hearing to select a country to which you choose to be deported in the event that your deportation is required by law. The special inquiry officer will also notify you concerning any other country or countries to which

your deportation may be directed pursuant to law; and upon receipt of this information, you will have an opportunity to apply during the hearing for temporary withholding of deportation if you believe you would be subject to persecution in any such country on account of race, religion, or political opinion.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service without further notice, or in a determination being made by the special inquiry officer in your absence.

DECISION OF THE IMMIGRATION JUDGE

(SAME TITLE)

In Deportation Proceedings Under Section 242 of the Immigration and Nationality Act

Upon the basis of respondent's admissions I have determined that he is deportable on the charge(s) in the Order to Show Cause.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before November 25, 1974 or an extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to Italy on the charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, the respondent shall be deported to —.

Copy of this decision has been served on respondent.

Appeal: Waived

Dated July 25, 1975

Place, New York, New York

s/
Immigration Judge

LETTER FROM DEPARTMENT OF STATE
DATED OCTOBER 21, 1971

Mr. Donald J. Sisk
Pavia & Harcourt
Attorneys and Counselors at Law
63 Wall Street
New York, New York 10005

Dear Mr. Sisk:

I refer to our letter of September 22, 1971 concerning the immigrant visa case of Mr. Vincenzo Burrafato.

The Consulate General at Palermo reported that Mr. Burrafato's case has been carefully reviewed by that office. However, no facts were disclosed which would warrant a reversal of the original finding of ineligibility under Section 212(a) of the Immigration and Nationality Act.

While it is our sincere desire to cooperate in every way possible to clarify the matter, the grounds for the refusal are of a confidential nature and we are prohibited from divulging either the specific subsection of law under which the visa was refused or the facts which constituted the basis for the refusal. However, the Department has had access to the essential facts and is of the opinion that the denial was fully warranted under the terms of the law.

Sincerely yours,

s/George A. Berkley
George A. Berkley, Chief
Public Services Division
Visa Office

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-689

VINCENZO BURRAFATO, ET UX., PETITIONERS

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that Vincenzo Burrafato's application for an immigrant visa was improperly denied.

Vincenzo Burrafato is a native and citizen of Italy. In 1961 he was married in Italy to Antonina Burrafato, a United States citizen. They are the parents of two children both of whom were born in Italy. In February 1970, Vincenzo Burrafato applied to the United States Consul in Palermo, Italy, for an immigrant visa to enter this country. Without waiting to learn whether his application would be granted, he entered the United States illegally on February 17, 1970. His visa application was subsequently denied by the United States Consul in Palermo and, upon review, the Visa Office of the United

States Department of State refused to overturn that decision (Pet. App. A-2 through A-3).[1]

On December 7, 1972, Mr. Burrafato was served with an order to show cause why he should not be deported. At the deportation hearing, he admitted that he had entered the United States illegally. He was therefore found to be deportable under Section 241(a)(1) of the Act, 8 U.S.C. 1251(a)(1) (Pet. App. A-3).[2]

On June 4, 1974 — after Mr. Burrafato had been served with the order to show cause, but before the immigration judge had issued his decision — petitioners filed the present action. Their principal contentions were that Antonina Burrafato's rights, as a United States citizen, to due process and equal protection of the law and Vincenzo Burrafato's right to due process had been violated by the denial of the latter's visa application without a statement of reasons. They sought declaratory and injunctive relief, including a declaration that Mr. Burrafato shall be "deemed a lawful citizen of the United States" (Pet App. A-9).

On January 20, 1975, the District Court for the Eastern District of New York dismissed petitioners' complaint for lack of subject matter jurisdiction (Pet. App. A-8

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[1]In denying the application, the United States Consul in Palermo stated that Mr. Burrafato was ineligible to receive an immigrant visa under Section 212(a) of the Immigration and Nationality Act, 66 Stat. 182, as amended, 8 U.S.C. 1182(a) (Pet. App. A-3). Upon review, the Visa Office of the United States Department of State concluded that "no facts [had been] disclosed which would warrant a reversal of the original finding of ineligibility under [the Act]" (*id.* at A-17).

[2]Petitioners have not claimed that the proceedings leading to the finding of Vincenzo Burrafato's deportability were lacking in due process.

through A-11). The court of appeals affirmed (*id.* at A-1 through A-7).

Petitioners have not in this proceeding attempted to disavow Vincenzo Burrafato's admission that he entered this country illegally and they have not challenged the correctness of the immigration judge's finding that he is deportable (Pet. App. A-3). None of the contentions made here by petitioners would entitle Mr. Burrafato to an immigrant visa or make his presence here legal. Rather, if petitioners' contentions were accepted, Mr. Burrafato would be entitled only to a statement of reasons why his visa application was denied.

Petitioners were given such a statement of reasons during this litigation.[3] Although Mr. Burrafato has not attempted to submit evidence refuting the factual basis of the reasons given him for the denial of his visa application, as he is entitled to do under 22 C.F.R. 42.130 (a), the decisions below do not preclude him from doing so. Indeed, Mr. Burrafato remains free to submit evidence in support of his visa application to the United States Consul in Palermo or to file a new application after he returns to Italy — where he would be but for his unlawful

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[3]Although Mr. Burrafato was not informed by the United States Consul in Palermo at the time the decision was made denying his application for an immigrant visa of the reasons for that decision, as required by 22 C.F.R. 42.130(a), while this action was pending in the district court petitioners were formally apprised that the application had been denied because of his "association with [an] organized criminal society" in Italy and that he was therefore excludable under Section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(27) (Pet. App. A-5 n. 3). Section 212(a)(27) encompasses generally any person whose entry into the United States might present a threat "to the public interest, * * * welfare, safety, or security of the United States * * *." The Department of State and the United States Consul in Palermo correctly concluded that Section 212(a)(27) requires the exclusion of persons with ties to criminal organizations in their native countries.

entry into the United States. Since petitioners have received all the relief to which they are entitled,[4] there is no reason for this Court to grant their petition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[4]Petitioners are not entitled to a separate statement of reasons from the State Department. The regulation relied upon by petitioners in support of their argument that the Department failed to follow established procedures in dealing with Mr. Burrafato's visa application (22 C.F.R. 42.130) provides in essence that the State Department may review the decision of a consular officer denying an application for an immigrant visa and furnish an advisory opinion to such officer. The opinion is binding on the consular officer only insofar as it concerns "an interpretation of law, as distinguished from an application of the law to the facts" of a particular case. 22 C.F.R. 42.130(c). The Department is not obligated by statute or regulation to review the denial of a visa application in any given case, or class of cases. Nor is it required to furnish reasons for refusing review in a given case or for refusing, upon review, to overturn the decision of a consular officer.